

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department on its own motion as to)
the propriety of the rates and charges set forth in the)
following tariffs: M.D.T.E. Nos. 14 and 17, filed with the) D.T.E. 98-57
Department on August 27, 1999, to become effective)
September 27, 1999, by New England Telephone)
Telegraph Company d/b/a Bell Atlantic-Massachusetts.)

)

HEARING OFFICER RULING GRANTING
DIGITAL BROADBAND COMMUNICATIONS'
LATE-FILED PETITION TO INTERVENE
AS A LIMITED PARTICIPANT

I. BACKGROUND

On April 15, 1999, the Department issued a notice of public hearing and procedural conference in this docket which set a May 10, 1999 deadline for the filing of petitions to intervene. On November 10, 1999, the Department issued its latest revised procedural schedule in this docket. On November 23, 1999, Digital Broadband Communications, Inc. ("DBC") filed an untimely petition to intervene ("Petition") as a limited participant in this docket. The Department received no responses to the Petition.

II. LATE-FILED PETITION TO INTERVENE

A. Standard of Review

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The Department's regulations require that a petition to intervene describe how the petitioner is substantially and specifically affected by a proceeding. 220 C.M.R. §1.03(1)(b); see also G.L. c. 30A, § 10. In interpreting this standard, the Department has broad discretion in determining whether to allow participation, and the extent of participation, in Department proceedings. *Attorney General v. Department of Public Utilities*, 390 Mass. 208, 216 (1983); *Boston Edison Company v. Department of Public Utilities*, 375 Mass. 1, 45 (1978) (with regard to intervenors, the Department has broad but not unlimited discretion), cert. denied, 439 U.S. 921 (1978); see also *Robinson v. Department of Public Utilities*, 835 F. 2d 19 (1st Cir. 1987). The Department may allow persons not substantially and specifically affected to participate in proceedings for limited purposes. G.L. c. 30A, § 10; 220 C.M.R. § 1.03(1)(e); *Boston Edison*, 375 Mass. at 45. A petitioner must demonstrate a sufficient interest in a proceeding before the Department will exercise its discretion and grant limited participation. *Boston Edison*, 375 Mass. at 45. The Department is not required to allow all petitioners seeking intervenor status to participate in proceedings (*id.*).

In ruling on late-filed petitions to intervene, or otherwise participate in its proceedings, the Department takes into account a number of requirements and factors in its analysis. First, the Department considers whether a petitioner has demonstrated good cause for late-filing. See 220 C.M.R. § 1.01(4). While "good cause" may not be readily susceptible of precise definition, the proponent of a waiver must make a convincing showing of good cause and may not reserve such a showing for a later appeal of the Hearing Officer's ruling. See *Bay State Gas Company*,

D.P.U. 95-52, at 2 Interlocutory Order (July 21, 1995). Administrative efficiency requires that a proponent of a waiver state all available grounds at the time the ruling is requested. If the Department finds that there is good cause and that the petitioner is substantially and specifically affected, then the Department balances the extent of participation against the need to conduct a proceeding in a complete, efficient and orderly fashion. When balancing, the Department has considered: (1) the extent of the delay, (2) the effect of the late participation on the ongoing proceeding, and (3) the explanation for the tardiness. *Western Massachusetts Electric Company*, D.P.U. 92-8C-A at 5 (1993); *NYNEX*, D.P.U. 94-50 at 3 (1994).

B. Position of the Parties

DBC states that it is a facilities-based competitive local exchange carrier ("CLEC") focused on delivering a full array of voice and data services to customers in Massachusetts (Petition at 1). Among its efforts to facilitate these offerings, DBC indicates that it has recently concluded an interconnection agreement with Bell Atlantic (*id.*). DBC states that while negotiating its interconnection agreement with Bell Atlantic, DBC was repeatedly referred to the rates, terms and conditions contained in BA's M.D.T.E. No. 17 as setting forth the procedures that apply to ordering and provisioning a full range of elements and services including UNEs, collocation, and most significantly to DBC, the bona fide request ("BFR") process (*id.* at 1-2). DBC states that near the conclusion of negotiations, when BA and DBC were negotiating the language in the proposed interconnection agreement that describes the BFR process, Bell Atlantic indicated that M.D.T.E. No. 17 was not yet approved but that the evidentiary hearing is to be held in December 1999 (*id.* at 2). Because DBC believes that certain improvements can be made to M.D.T.E. No. 17, particularly to the language addressing the BFR process, DBC took immediate action to intervene in this proceeding (*id.*). DBC states that its intervention does not

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require any change to the procedural schedule and will not delay this proceeding (id.). DBC states that no party will be prejudiced by the granting of this late-filed petition (id.). The Department received no objections or comments to DBC's late-filed Petition to Intervene.

C. Analysis and Findings

First, the present proceedings may affect the interconnection agreement which DBC has recently concluded with Bell Atlantic. Thus, the Hearing Officer finds that DBC is substantially and specifically affected by this proceeding.

Second, the Hearing Officer finds that DBC has made a convincing showing of good cause for the late-filed Petition. DBC indicates that, after learning from Bell Atlantic near the conclusion of their negotiations, M.D.T.E. No. 17 was not yet approved but that an evidentiary hearing is to be held in December 1999, DBC took immediate action to intervene in this proceeding.

Last, in balancing the competing interests of DBC's need to participate against the Department's need to conduct a proceeding in a complete, efficient and orderly fashion, the Hearing Officer finds that DBC's delay in filing the petition to intervene will not cause undue prejudice to the other parties or delay this proceeding so long as DBC's adheres to the procedural schedule. Accordingly, the Hearing Officer grants the Petition and Re-Submitted Petition to Intervene filed by DBC as a limited participant with the rights of receiving all documents filed by the Department and the parties and the right to submit comments to the Department for consideration.

III. RULING

Accordingly, after due consideration, the Hearing Officer hereby grants the Late-Filed Petition to Intervene filed by Digital Broadband Communications, Inc. as a limited participant with the rights of receiving all documents filed by the Department and the parties, and the right to submit comments and/or briefs to the Department for consideration. As a limited participant, DBC does not have the right to present witnesses, to cross-examine witnesses, or to appeal the final decision of the Department. DBC shall abide by the procedural schedules set forth and any subsequent revisions and shall not delay these proceedings.

Under the provision of 220 C.M.R. § 1.06(6)(d)(3), any aggrieved party may appeal this Ruling to the Commission by filing a written appeal with supporting documentation by December 6, 1999, at 5:00 p.m. A copy of this Ruling must accompany any appeal. Any response to any appeal must be filed by December 9, 1999, at 5:00 p.m.

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Tina W. Chin, Hearing Officer